No. 12,960

IN THE

United States Court of Appeals

For the Ninth Circuit

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA (a corporation),
Appellant,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH, and DORIS G. BARUH,
Appellees.

BRIEF OF APPELLEE MILDRED A. DUNWOODY.

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PREFACE.

Appellee, Mildred A. Dunwoody, agrees with appellant's statement of the case, but believes it too limited. Appellee will, therefore, present her statement as briefly as possible, consistent with clarity.

STATEMENT OF CASE.

Appellee Dunwoody was owner of buildings in Chico, California, and leased them to Grand Rapids Furniture Company for fifty years, commencing Jan-

uary 1, 1944, by written lease, dated November 1, 1943 (R. 77). The interest of Grand Rapids Furniture Company was transferred to the appellees, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh, and they are still lessees of the premises (R. 77).

Paragraph 12 of the original lease of 1943 reads as follows:

> "Should the whole or any part of any building or buildings at any time standing on the demised premises be partially or totally destroyed by fire after the commencement of the term hereof, the same shall be restored by the Tenant at its own expense without unnecessary delay. The Tenant covenants and agrees that it, the Tenant, shall at all times during the term hereof and at its own expense keep any and all buildings or improvements now upon or hereafter constructed or placed upon said premises, insured against loss or damage by fire in an amount equal to eighty (80) per cent of the full insurable value thereof above the foundation walls. All such policies of insurance shall be payable to the landlords and Tenant as their interest may appear, and shall be written by solvent fire insurance companies authorized to do business in the State of California. Such Policies of insurance shall be held by the Tenant, and the Landlords shall be furnished with the usual certificates from insurance companies showing the existence of such policies. In case of loss, the Tenant is hereby authorized to adjust the loss and execute the proofs thereof in the names of both the Tenant and the Landlords. So long as the Tenant shall comply with the provisions of this lease, respecting fire insurance, the

Landlords covenant and agree not to carry or permit to be carried during the term of any extension of renewal thereof, any additional or other fire insurance covering any interest in the demised premises without the knowledge and consent of the Tenant, but if the Landlords shall desire to carry additional insurance and request the tenant to consent thereto, its consent shall not be unreasonably withheld when any such insurance shall not jeopardize or decrease the amount recoverable under the insurance or self insurance herein provided to be carried by the Tenant. The Tenant shall, upon the request of the Landlords furnish the Landlords evidence of its compliance with these provisions and of the fact of coverage adequate in the premises.

"Notwithstanding anything else herein contained to the contrary, if the premises or a portion thereof be damaged by fire, upon the payment of insurance by the insurance company of the loss to the parties hereto as their interests may appear, all of such payment may be used by the Landlord for the purpose of restoring the portion damaged if the Landlord desires."

For the purpose of facilitating the trial in the action, a stipulation of fact was entered into by the parties (R. 37), and later a supplemental stipulation of fact was entered into (R. 65). Hereafter, when a fact is referred to herein, it will be to a fact "stipulated" in one or the other of the aforementioned stipulations, unless otherwise stated.

Appellee, in accordance with the lease, secured the consent of the other appellees herein, the lessees of the

property, to carry fire insurance upon the demised premises, and secured a policy in appellant company in the amount of $10,000.00 (R. 38).

In pursuance of Paragraph 12 of the original lease (supra), the lessees, the other appellees herein, took out insurance against fire with the Security Insurance Company of New Haven, in the amount of $36,795.00; the insured were the defendants and appellees, Harold F. Baruh and Harold A. Goldman and/or M. Dunwoody; such policy insured the replacement costs of said buildings without deduction, but with depreciation (R. 41). The total insurance carried under both policies was $46,795.00.

The buildings were totally destroyed by fire on April 8, 1949 (R. 41), while both policies were in existence. The policies taken out by the lessee appellees were acknowledged by Security Insurance Company a total loss, and payment thereon was made as follows: $25,000.00 in cash, and $11,743.89 to be paid at a later date, as agreed in the policy (R. 65). The policy of appellant in favor of appellee, in the sum of $10,000.00, was not, and has not been paid (R. 6 and 7).

The $25,000.00 that was paid to the appellees Goldman and Baruh was deposited in their own name. They, at the time, claimed it was their moneys; however, after negotiations, the $25,000.00, less $1,173.89, which was expended to remove debris upon the property, was deposited in the name of the appellee Dunwoody, and in the names of appellees Baruh and Goldman, in a savings account in a bank in San Francisco, to be withdrawn only upon the signatures of Mildred

A. Dunwoody and Harold A. Baruh or Harold F. Goldman (R. 66).

Appellant entered the trial of the action claiming that the buildings were overinsured, and that their replacement value was less than insurance carried, namely, $46,795.00. Later, however, and in open Court, appellant withdrew such claim and orally stipulated that the replacement value of the buildings was in excess of $46,795.00, and in its opening brief states: "It subsequently developed by stipulation, however, that the loss by fire was in excess of the total amount of fire insurance; this eliminates any question of apportionment * * *" (Brief 4).

Following the fire, appellee Dunwoody was faced with the following:

(1) Claim by appellant insurance company that it either owed her nothing, or $7,170.49 (Compl. R. 7). (This claim was abandoned during trial.)

(2) Claim of co-appellees Goldman and Baruh that they were not obligated, under paragraph 12 of the original lease of 1943, to restore the buildings.

(3) Claim of lessee co-appellees that the insurance moneys received by them belonged to them. (This claim was resolved prior to trial by the co-appellees depositing the money in a savings bank in the names of the three appellees as set forth above.)

JUDGMENT.

The judgment (R. 82) is fourfold and as follows:

(1) That the appellee Dunwoody recover from appellant $10,000.00, the full value of the policy, with interest at the rate of 7% per annum from January 21, 1950, until paid, and costs of suit in the sum of $20.00.

(2) That upon the payment of the aforementioned sum to appellee Dunwoody, the appellant is not entitled to be subrogated to any of the rights of said appellee Dunwoody against the lessee appellees.

(3) That appellees Harold A. Goldman and Harold F. Baruh are legally bound to perform the obligations of paragraph 12 and the provisions of that certain lease dated November 1, 1943.

(4) That the lessee appellees recover from appellant $20.00 costs.

APPEAL.

Appellant appeals from the following portions of said foregoing judgment (R. 84):

(1) The judgment in favor of appellee Dunwoody and against appellees.

(2) The judgment that upon payment by appellant to appellee Dunwoody of said sum of $10,000.00, the appellant is not entitled to be subrogated to any of the rights of the said appellee Dunwoody as against co-appellees.

(3) That the co-appellees do have and recover costs in the sum of $20.00.

No appeal was taken by the other parties to the action, and thus this appeal is prosecuted only by appellant, Hardware Mutual Insurance Company of Minnesota, a corporation.

ISSUES ON APPEAL.

While the appellant has appealed threefold, as shown above, it apparently has abandoned its appeal from the money judgment in favor of the appellee Dunwoody, and appears to limit the issue on appeal solely to whether it is or is not entitled to be subrogated *pro tanto* to the rights of appellee Dunwoody against appellees Harold Goldman and Harold Baruh under the lease.

In the matter, we have had the opportunity of reviewing both appellant's brief, and the co-appellees', Goldman and Baruh, brief. The latter brief analyzes cases cited by appellant, and with such analysis and the conclusions drawn therefrom in such brief, we fully concur, and deem it would be a waste of time of the Court for us to further review these cases.

ARGUMENT.

I.

THE JUDGMENT IN FAVOR OF APPELLEE DUNWOODY IN THE SUM OF $10,000.00 PLUS INTEREST AND COSTS, SHOULD BE UPHELD.

The appellant having abandoned its appeal as to the portion of the appeal appealing from the judgment

that appellant pay to the appellee Dunwoody the sum of $10,000.00 plus costs and interest, this judgment should be upheld.

Irrespective of whether or not appellant abandoned this portion of its appeal or not, the Court perforce would have upheld the judgment, inasmuch as the appellant contends that it is entitled to be subrogated to certain rights of the appellee Dunwoody, and the law is that before any rights of subrogation may be invoked by an insurer, it must have paid the insured in full (Ins. C.A. Sec. 2070, 2071).

II.

THE APPELLANT IS NOT ENTITLED TO BE SUBROGATED TO ANY RIGHTS OF THE APPELLEE DUNWOODY.

The sole contention of the appellant on this appeal is that the judgment should provide for subrogation of appellant to certain rights of the appellee Dunwoody. In its brief it phrases its contention as follows:

> "The trial court erred in finding and holding that upon the payment of $10,000 by appellant to appellee Dunwoody pursuant to the judgment of the court, appellant is not entitled to be subrogated pro tanto to the rights of appellee Dunwoody against appellees Harold Goldman and Harold Baruh under the lease whereby the last named appellees are obligated to restore the premises."

Under Paragraph 12 of the original lease of 1943, appellee Dunwoody had two rights against co-appellees in the event of destruction of the buildings by fire, they being:

1. To require co-appellees to restore the buildings, and

2. To take the insurance moneys paid the co-appellees and herself rebuild.

Certainly appellant does not wish to be subrogated to the rights of appellee Dunwoody to take the insurance money and rebuild, nor does it claim such right. Therefore, there remains for the appellant to claim only that it has the right of subrogation to compel co-appellees Baruh and Goldman to restore the buildings.

Plate Glass Underwriters' Mutual Insurance Co. v. Ridgewood Realty Co. (1925), 219 Mo. App. 186, 269 S.W. 659.

In respect to the claim of appellant, we deem the case of *Plate Glass Underwriters' Mutual Insurance Company v. Ridgewood Realty Company* (1925), 219 Mo. App. 186, 269 S.W. 659, while a decision of a foreign Court, determines the issue in this case. This case is fully analyzed in the brief of the co-appellees on page 9, and it would only be repetition to again analyze it here, but we urge the principles it enunciates.

Meyer v. Bank of America (1938), 11 Cal. (2d) 92;

American Alliance Insurance Company v. Capital National Bank of Sacramento, 75 Cal. (2d) 787.

Also, we urge the principles enunciated in the actions of the above-cited cases; those principles are fully considered in co-appellees' brief, with their analysis.

However, there are other considerations which should prompt the Court to uphold the judgment attacked.

In this action there has been no proof that the buildings may be restored; there is no proof of the cost of restoration, if they could be restored. The record does show that the replacement cost of the buildings that existed exceeds $46,795.00, but by how much?

Also, suppose the appellee Dunwoody becomes disgusted with the situation, which well she might. The fire occurred upon April 8, 1949, and after two years and one-half she has not yet received her insurance money, although she carried the insurance for eighteen years, nor have her buildings been restored, and finds herself in Court at no inconsiderable expense. If appellee Dunwoody elects to take the insurance money, cancel the co-appellees' contract or lease, and rebuild her own buildings, would the appellant's contention be that she is unable to do so because it jeopardizes their alleged rights of subrogation? These possibilities are only mentioned to show the absurdness of appellant's position; can an insurance company, by claiming the right of subrogation, destroy the substantial rights of the lessor under her contract or lease, which would be the case if she were denied her right to take the insurance money and herself rebuild. We submit that it cannot.

However, other considerations should require the Court to uphold the judgment.

The provisions of the policy of insurance should control; the policy provides (R. 44):

> "SUBROGATION. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

This provision limits the right of subrogation of insurer to where it claims that the loss was occasioned by the "act or neglect of any person or corporation". Here appellant does not claim the fire loss was occasioned by the act or negligence of anyone. In construing a similar policy, the Courts of other jurisdictions have upheld this limitation upon the right of subrogation when such limitation is part of the policy.

Merchants Fire Assur. Corp. v. Hamilton Co. (1949, R.I.), 69 A. (2d) 551.

In its construing of the meaning of a similar provision in an insurance policy, the Supreme Court of New Jersey in

Fire Association of Philadelphia v. Schellenger, 84 N.J. Eq. 464, 94 A. 615, 616,

said:

> "The rights of the parties to this litigation, therefore, must depend upon the meaning of the provision of the policy which deals with the mat-

> ter of subrogation. It is plain from a reading of this part of the contract that the parties to it intended that the right of the insurer, in case it paid the loss, should not be an absolute, but a conditional one; the condition being that the insurer should 'claim that the fire was caused by the act or neglect' of some third person."

In its brief, appellant claims the right that in the event the buildings are restored by the co-appellees, to proceed against appellee Dunwoody to recover the amount of insurance paid by it to her, or, if the buildings be not restored, the right to proceed against the co-appellees, Goldman and Baruh, to collect such moneys. Nowhere heretofore has the appellant presented this position; it arises for the first time upon this appeal. We refer the Court to the prayer of the appellant's complaint (R. 7).

In its prayer appellant succinctly states its position. Nowhere therein is asked a recovery from the appellee Dunwoody if the buildings be rebuilt, nor from the co-appellees if they be not rebuilt. These questions are beyond the issues, as pointed out in co-appellees' brief on pages 26 and 27.

CONCLUSION.

I. Appellee Dunwoody respectfully submits that the judgment in her favor should be sustained, and that she be allowed her costs upon this appeal.

II. Appellant Dunwoody also respectfully submits the entire judgment appealed from be sustained.

Dated, Chico, California,
October 19, 1951.

Respectfully submitted,
PETERS AND PETERS,
Attorneys for Appellee
Mildred A. Dunwoody.